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 Corporation; Polo Retail, LLC; Polo Ralph Lauren  
 Corporation, doing business in California as Polo  
 Retail Corporation; and Fashions Outlet of  
 America, Incl.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANN OTSUKA, an individual; et al,

Plaintiffs,

v.

POLO RALPH LAUREN CORPORATION,  
 a Delaware Corporation; POLO RETAIL,  
 LLC, a Delaware Corporation; et al.,  
 Defendants.

Case No. C07-02780 SI

POLO RALPH LAUREN CORPORATION,  
 POLO RETAIL, LLC, POLO RALPH LAUREN  
 CORPORATION, doing business in California as  
 POLO RETAIL CORP; and FASHIONS OUTLET  
 OF AMERICA, INC.'S AMENDED  
 COUNTERCLAIM FOR BREACH OF  
 FIDUCIARY DUTY AND CONSPIRACY TO  
 COMMIT CONVERSION

POLO RALPH LAUREN CORPORATION,  
POLO RETAIL, LLC, POLO RALPH  
LAUREN CORPORATION, doing business  
in California as POLO RETAIL CORP; and  
FASHIONS OUTLET OF AMERICA, INC..

Counter-Claimants,

v.

JUSTIN KISER, an individual; and ROES 1-  
50, inclusive,

Counterclaim Defendants,

Defendants and Counter-claimants POLO RALPH LAUREN CORPORATION, POLO RETAIL, LLC, POLO RALPH LAUREN CORPORATION, doing business in California as POLO RETAIL CORP; and FASHIONS OUTLET OF AMERICA, INC. (hereinafter “Polo”) state the following for their Amended Counterclaim against Counterclaim Defendant JUSTIN KISER (“Kiser” or “Counterclaim Defendant”):

### **NATURE OF THE ACTION**

1. This is an action for breach of fiduciary duty and conspiracy to commit conversion, under California state law. Polo is engaged in the business of manufacturing and selling premium clothes, home furnishings and other valuable products in its retail stores in California. Counterclaim Defendant has breached his fiduciary duty to Polo and conspired to convert Polo property for unauthorized personal use. Accordingly, Polo seeks restitution, money damages, and such other relief as is deemed appropriate.

### **PARTIES**

2. POLO RALPH LAUREN CORPORATION, POLO RETAIL, LLC, POLO RALPH LAUREN CORPORATION, doing business in California as POLO RETAIL CORP., and FASHIONS OUTLET OF AMERICA, INC. are, and at all relevant times mentioned in this Counterclaim were, Delaware Corporations with their principal places of business in the state of New York.

3. Polo is further informed and believes and thereon alleges that, as of the date of the filing of his original complaint, Plaintiff and Counterclaim Defendant Kiser was an individual

1 residing in Contra Costa County, California. Kiser was employed by Polo as a Sales Associate in the  
2 Ralph Lauren store located at 90 Post Street, San Francisco, California 94101 ("Polo store") between  
3 approximately July 11, 2004 and August 5, 2005.

4 4. The true names and capacities, whether individual, corporate, associate or otherwise,  
5 of Counterclaim Defendants sued in this Counterclaim as ROES 1 through 50, inclusive, are  
6 unknown to Polo who sues those Counterclaim Defendants by fictitious names. Polo alleges on  
7 information and belief that each of the Counterclaim Defendants sued herein as ROES 1 through 50  
8 are responsible in some manner for the events and obligations alleged herein. Polo will seek leave of  
9 court to amend this Counterclaim to allege their true names and capacities when ascertained.

#### 10 **JURISDICTION AND VENUE**

11 5. This Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C. § 1367(a) in  
12 that this proceeding arises and/or relates to a pending action over which this Court has subject matter  
13 jurisdiction.

14 6. This Court also has original jurisdiction under 28 U.S.C. 1332(a) and 28 U.S.C. §  
15 1332(d), the Class Action Fairness Act of 2005, Pub.L. 109-2 § 4(a), 119 Stat. 9.

16 7. The action is a civil action between citizens of different States. Plaintiffs and  
17 Counterclaim Defendant Kiser are and were at the time their original complaint was filed, citizens of  
18 the State of California and the Commonwealth of Kentucky, and Defendants and Counterclaimants  
19 each and independently are, and at the time the original complaint was filed, were, Delaware  
20 Corporations with principal places of business in the State of New York.

21 8. This Court has personal jurisdiction over Kiser because he resides within this State  
22 and Judicial District, as of the date of the filing of his original complaint.

23 9. Polo asserts its Counterclaim in this venue pursuant to 28 U.S.C. §1391(b) because  
24 Polo's Counterclaim is being asserted in an action brought by Kiser in this District.

#### 25 **FACTUAL ALLEGATIONS**

26 10. Plaintiff incorporates herein by reference Paragraphs 1-9, inclusive.  
27  
28

1           11.     Upon information and belief, a former Polo employee by the name of Germania Baux  
2     ("Baux") improperly possessed Polo merchandise credits for use in any Polo retail store. Upon  
3     information and belief, the merchandise credits were improperly obtained by Baux.

4           12.     On or about June 22, 2005, while working as a Sales Associate in the Polo store, Kiser  
5     received a request from Baux to charge and send store merchandise using a merchandise credit. Baux  
6     specifically requested that Kiser enter data in the Point of Sale (POS) system under the fictitious  
7     name "Rose Cassamini" instead of her own name to avoid Polo's detection of their fraudulent  
8     activities. Baux also requested that Kiser send the merchandise addressed to "Rose Cassamini".

9           13.     Kiser inquired with Operations Manager Theresa Cruz ("Cruz") if it was possible for  
10    him to use merchandise credit on a "send sale" purchase but never informed Cruz that the purchase  
11    was for Baux, instead telling her that it was for a customer by the name of "Rose Cassamini".

12          14.     Kiser knew that it was improper and against Polo policy to use a fictitious customer  
13    name to send store merchandise yet completed the sale and sent the merchandise to Baux under the  
14    guise of "Rose Cassamini".

15          15.     On or about July 20, 2005, Kiser accompanied Baux to the Polo Ralph Lauren Factory  
16    Store located in Vacaville, California ("Polo Vacaville Outlet"). While at the store, Baux attempted  
17    to make a purchase using the Polo employee discount. When the cashier informed Baux that she  
18    could not use the Polo employee discount since she was no longer a Polo employee, Baux requested  
19    that Kiser purchase her merchandise for her, utilizing his Polo employee discount and with her  
20    merchandise credit. Kiser complied with Baux's request and purchased her merchandise with her  
21    merchandise credit through his Polo employee discount, even though he knew that it was against Polo  
22    policy to do so.

23          16.     On or about July 24, 2005, while working as a Sales Associate in the Polo store, Baux  
24    called Kiser to inquire about an expensive pair of jeans in a size 30. Kiser checked the store  
25    inventory and then called Baux back informing her that the jeans were available in size 30. Baux  
26    requested that Kiser ring up the merchandise using two separate Polo merchandise credits under the  
27    fictitious name "Gina Rochas". Baux further instructed Kiser to ring up her purchase when no  
28

1 managers were around. Kiser knew it was improper to complete the sale under a fictitious name but  
2 completed the sale anyway, and sent the item to a false name care of his home address.

3 17. With respect to sales that Kiser improperly processed for Baux, Kiser received eight  
4 percent (8%) of the sales value in the form of personal commissions.

5 18. Polo's Retail Employee Handbook prohibits dishonest conduct, including the "[L]ying  
6 or falsification in any manner related to employment." Polo Retail Employee Handbook at p. 21.

7 19. Polo's Retail Employee Handbook prohibits employees from using their Polo  
8 employee discount "to purchase items for other individuals (other than as gifts)...." Polo Retail  
9 Employee Handbook at p. 23.

10 **COUNT ONE**  
(Breach of Fiduciary Duty)

11 20. Polo incorporates herein by reference Paragraphs 1-19 inclusive.

12 21. Kiser had a duty of loyalty as a Polo employee to act in the best interest of Polo, and  
13 to not take actions which would financially damage Polo. Kiser breached his fiduciary duty by  
14 manipulating records in the POS system under fictitious customer names in order to generate a sale.

15 22. Kiser further breached his fiduciary duty by utilizing his Polo employee discount, as  
16 well as suspect Polo merchandise credits, for the financial benefit of a non-Polo employee.

17 23. Kiser knew or had reason to know that Polo purchases made by Baux with suspect  
18 Polo merchandise credits were made in bad faith, especially when she requested that fictitious names  
19 be used instead of her own so as to not draw suspicion. Kiser and Baux intentionally acted in bad  
20 faith by performing the sales transactions outside the presence of a manager to avoid Polo's detection  
21 of their fraudulent activities.

22 24. Kiser acted intentionally, willfully, in bad faith and in defiance of Kiser's duty of  
23 loyalty to Polo, and Kiser's conduct was oppressive and malicious entitling Polo to an award of  
24 punitive and exemplary damages.

25 25. As a proximate result of these acts of Kiser as herein-above described, Polo has been  
26 damaged in an amount to be determined at trial.

27 //

28 //

**COUNT TWO**

**(Civil Conspiracy To Commit Conversion)**

26. Polo incorporates herein by reference Paragraphs 1-25 inclusive.

27. On or about June 22, 2005, July 20, 2005 and July 24, 2005, Kiser, Baux and Roes 1-50 formulated a common plan or plans and a conspiracy to convert certain valuable Polo merchandise for Baux's own use.

28. At all times mentioned herein, Polo was the rightful owner of, and was and still is, entitled to the possession of the following personal property, namely: Polo retail clothing including a certain jacket, skirt, jeans and similar merchandise.

29. On or about June 22, 2005, July 20, 2005 and July 24, 2005, the property described above had a value of approximately \$2500.00.

30. On or about June 22, 2005, July 20, 2005 and July 24, 2005, Kiser and Baux acted in concert to take the property described above from Polo's possession and to convert the same to Baux's own use, as described in paragraphs 12, 15 and 16.

31. When Baux was caught with incriminating evidence, including price tickets in her handbag, in Polo's San Francisco store, she had promptly quit, thereby frustrating Polo's attempt to investigate the incriminating evidence.

32. Upon information and belief, after Baux was caught with incriminating evidence, she discussed the theft accusations against her with her roommate Kiser and informed Kiser that in view of such accusations, she was quitting her employment with Polo.

33. As a result of this discussion, Kiser knew that Baux had quit Polo amid accusations of theft of Polo merchandise.

34. Kiser knew or had reason to know that store merchandise credits received from Baux, and used by him to obtain the merchandise described above, were improperly obtained by Baux (from stolen merchandise returns or otherwise) and that Polo was not being paid for the items.

35. On information and belief, the merchandise credits were improperly obtained by Baux by returning merchandise to Polo that she had stolen from Polo while she was an employee.

1           36.     On information and belief, despite such knowledge, Kiser conspired with Baux to  
2 cause new line clothing to be delivered to Baux, as described above, by using improper merchandise  
3 credits that Baux had obtained by returning stolen merchandise and by sending the new line clothing  
4 to Baux under fictitious names.

5           37.     Kiser aided and abetted Baux by using fictitious purchaser names on or about June 22,  
6 2005 and July 24, 2005 so as to avoid Polo's detection of the wrongful conversion of merchandise.  
7 Kiser and Baux intentionally acted in bad faith by performing these transactions outside the presence  
8 of a manager, in order to avoid Polo's detection of their conversion.

9           38.     On information and belief, Kiser knowingly and intentionally used fictitious names on  
10 those dates to deliver clothing to Baux so that he could earn commissions on the sales and avoid  
11 scrutiny by Polo of his actions and of Baux's use of improperly obtained merchandise credits.

12           39.     On or about July 20, 2005 Kiser further aided and abetted Baux's use of the  
13 improperly obtained merchandise credits by agreeing to purchase for her benefit merchandise at the  
14 Vacaville Polo factory outlet store by using his employee discount -- a transaction that also violated  
15 company policy.

16           40.     This plan was intended by all participants to, and in fact did, financially deprive Polo  
17 of certain amounts of money by using Kiser's Polo employee discount for the benefit of a non-Polo  
18 employee, and to secure merchandise at a reduced price not available to the general public.

19           41.     This plan was further intended by all participants to, and in fact did, financially  
20 deprive Polo of payment for the items by falsifying Polo documents and manipulating records in the  
21 Polo POS system to generate transactions based on improperly obtained store credits, and to thereby  
22 avoid suspicion by Polo management of the participants' improper conduct and conversion of  
23 merchandise.

24           42.     As a proximate result of Counterclaim Defendant's decision to act in concert with  
25 Baux to convert Polo merchandise for her own use and to falsify company documents and to  
26 improperly use employee discounts, Polo has lost the value of several expensive merchandise items.

27           43.     Polo has incurred further identifiable monetary losses as a result of the aforementioned  
28 conspiracy, in the amount of the value of the improperly obtained merchandise credits and the value

1 of the undeserved commission payments made to Kiser for the phony “sales” made to Baux using  
2 such merchandise credits.

3 44. Kiser’s conduct was willful, malicious and oppressive and justifies the awarding of  
4 punitive and exemplary damages.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Polo prays for judgment against Kiser as set forth below.

- 7 1. For restitution and for compensatory damages in an amount to be proven at trial;  
8 2. For interest on all damages at the legal rate according to proof;  
9 3. For attorney’s fees;  
10 4. For punitive and exemplary damages;  
11 5. For costs of suit incurred; and  
12 5. For such other and further relief as the court may deem just and proper.

13  
14 Dated: December 7, 2007.

GREENBERG TRAURIG, LLP

15  
16 By: /s/ William J. Goines

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19 Neil A. Capobianco  
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